

**IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA**

FAO No.376 of 2006.

Judgment Reserved on: 24.04.2007

Date of decision: May 4, 2007.

Shyam Dutt

...Appellant

Versus

Ashok Kumar & Another

...Respondents

Coram

The Hon'ble Mr. Justice Dev Darshan Sud, J.

Whether approved for reporting ?¹

For the Appellant: Mr. Rajinder Dogra, Advocate.

For the Respondents: Ms. Jyotsna Rewal Dua, Advocate.

Dev Darshan Sud, J.

This appeal has been filed by the appellant-defendant against the order of the learned District Judge, Sirmaur District at Nahan, whereby the suit has been remanded to the trial Court.

The respondent-plaintiff had instituted the suit out of which the present appeal arises against the defendant Shyam Dutt for possession of the premises as detailed in the plaint. Preliminary objection was taken by the defendant-appellant on the maintainability of the suit. It was alleged that the suit of the plaintiff was barred by principle of res

¹ *Whether the reporters of Local Papers may be allowed to see the judgement?*

judicata, since the father of the plaintiff had filed a similar suit against the present defendant which was contested on merits and by judgment and decree dated 21.7.2001 the suit was partly decreed. An appeal was carried to the learned District Judge. Cross objections were also filed. During the pendency of the appeal and cross objections, Jagar Nath, who was predecessor-in-interest of the plaintiff, died and the present plaintiff-respondent was substituted in place alongwith other proforma defendant. By a judgment and decree dated 8.4.2002, the learned District Judge accepted the appeal and dismissed the cross objections. It was held that the plaintiff could not prove himself to be the owner of the suit premises, hence he was not entitled to claim any relief. It was, thus, submitted that the judgment and decree having attained finality, the present suit for claim of rent and possession of the premises was not maintainable. The learned trial Court framed as many as 11 issues, but treated issue No.4 as a preliminary issue, which reads:-

"4. Whether the suit is barred by principle of *res judicata* as alleged ? OPD.

On consideration of the facts it was held that the suit is barred by the principle of *res judicata*. For this purpose the evidence of the plaintiff, defendant and judgments were considered.

An Appeal was preferred in the Court of the learned District Judge, Sirmaur, who by his judgment against which the present appeal has been filed, held that the plaint and the written statement of the earlier litigation between the parties have not been brought on record and as such, findings of res judicata could not be said to be in accordance with law. A direction was issued by the learned appellate Court that the suit will be tried afresh by affording opportunity to the parties to lead evidence on all the issues and thereafter to decide the matter in accordance with law. The learned Court further directed that even on issue No.4 the Court shall afford opportunity to the parties to lead afresh evidence, if any, and to decide the issue alongwith other material on the record. The case was remanded and a direction issued that the case be tried in accordance with law and the directions given in the judgment.

The defendant has appealed against this order in which amongst number of grounds. Learned counsel has submitted that there could be no remand of the suit as the evidence on the record itself was sufficient to prove the issue of res judicata urged by the defendant and is a bar in law to the proceedings initiated by the respondent-plaintiff. Learned counsel further submits that it is not the duty of the appellate Court to direct the recording of evidence etc. Learned counsel also submitted that in terms of

Order 14 Rule 2 of the Code of Civil Procedure, the learned trial Court was correct in dismissing the suit by not recording the evidence on the other issues.

In support of their contentions learned counsel for the parties have drawn my attention to a number of decisions. Learned counsel for the appellant has placed reliance on the judgment of this Court in ***Parkash Chand Anand vs. Dhanwant Singh, AIR 1972 Himachal Pradesh 17***, holding *inter alia* that where the parties are fully conversant of their respective cases and lead evidence on that issue, on which a correct decision could be arrived at, there is no necessity for remanding the case as no fresh trial is needed. He also places reliance on decision of the Hon'ble Supreme Court in ***K.Krishna Reddy and Others vs. The Special Dy.Collector, Land Acquisition Unit II, LMD Karimnagar, Andhra Pradesh, AIR 1988 SC 2123***. My attention has been drawn to para-12 of the judgment which reads as under:-

"... .. Now the remand means another round of litigation. There would be further delay in getting the compensation. After all money is what money buys. What the claimants could have bought with the compensation in 1977 cannot do in 1988"

"... .. The appellate power of remand, at any rate ought not to be exercised lightly. It shall not be resorted to unless the award is wholly unintelligible. It shall not be

exercised unless there is total lack of evidence. If remand is imperative, and if the claim for enhanced compensation is tenable, it would be proper for the appellate court to do modest best to mitigate hardships. The appellate court may direct some interim payment to claimants subject to adjustment in the eventual award".

Learned counsel for the respondent submits that the judgment is in accordance with law and the learned trial Court could not try the issue of res judicata as a preliminary issue. She places reliance on the judgment of the High Court of Punjab and Haryana in **Sursati vs. Bachan Singh and others 1987 PLJ, 329**, where the issue was as to whether the question of res judicata is one of law or fact. The Court held as under:-

"The present suit was filed by the petitioner for permanent injunction restraining the respondents from interfering in his possession. One of the defences raised was that the suit is barred by the principle of res judicata as a similar suit between the same parties instituted previously had already been dismissed. Issue No.3 was framed with respect to this plea. On the day when the plaintiff was to lead his evidence, the defendant moved an application for treating Issue

No.3 as a preliminary issue which was allowed by the impugned order. Aggrieved thereby, the plaintiff has come up in revision.

2. The question of res judicata is a mixed question of law and facts and is not a pure question of law. Only an issue of law which does not require any evidence to prove it can be treated as a preliminary issue and that too when the suit can be disposed of on its decision.
3. Therefore, the trial Court acted illegally in the exercise of its jurisdiction in treating Issue No.3 as a preliminary issue. The impugned order is accordingly set aside. No costs".

To similar effect is the decision of the High Court of Orissa in **Madhubananda Ray and another vs. M/s.Spencer and Company Ltd., AIR 1988 Orissa 35**, holding that the issue relating to jurisdiction is an issue of fact or mixed question of law and fact and cannot be decided as a preliminary issue. My attention was drawn to paras-11 and 15 of the judgment. Their Lordships held as under:-

"11. Under O.14. R.2, C.P.C. it is not permissible for the Court to decide an issue of fact as a preliminary issue. It, therefore, follows that where an issue of fact is

necessary to be decided before an issue of law relating to jurisdiction comes up for consideration, such issue cannot be taken up as a preliminary issue within the meaning of O.14, R.2, C.P.C.

15. Thus, it would not be correct to assume that any question of touching upon the jurisdiction of a Court would automatically become an issue of law as this question may as well depend on factual aspects. If no investigation is necessary and it is not necessary to go into controversial facts, the question relating to jurisdiction may be treated and decided as an issue of law only under the amended provision. If, on the other hand, it would be necessary to decide a factual controversy before arriving at a conclusion with regard to the question of jurisdiction of the Court, such a question cannot be treated to be a pure question of law. When the institution of the suit is incompetent under the law or when the Court finds that it has no jurisdiction and to come to such a conclusion, no investigation is necessary and no evidence is necessary to be recorded, the Court has jurisdiction to decide the case or any part thereof on an issue of law only".

Learned counsel has also placed reliance on the judgment of Punjab and Haryana High Court in **Hardwari Lal vs. Pohkar Mal and others AIR 1978 Punjab & Haryana 230**, holding that under Order 14 Rule 2

where determination of facts is involved, such an issue cannot be tried as a preliminary issue. The court in this case was adjudicating question of valuation of the suit which would require a probe on facts. It was submitted that for the purposes of determination of the issue of res judicata, it was necessary not only to examine the judgment, but also the plaint, the written statement and to determine if the matter was directly and substantially in issue in the previous suit. For this proposition, reliance was placed on ***Sajjadanashin Sayed MD.B.E.EDR. (D) BY LRS. Vs. Musa Dadabhai Ummer and Others (2000)3 SCC 350.***

On the consideration of the totality of the circumstances, I find that there is no reason to interfere with the judgment of the learned appellate Court. Not only has a direction been given to determine all the issues, but the learned appellate Court has found that the issue of res judicata, rightly, cannot be disposed of on the basis only of judgment. While remanding the matter, the learned appellate Court has kept the right of the appellant intact by granting permission to lead such other or further evidence which he may require on the issue of res judicata also. The order, therefore, cannot be treated as being adverse to the interest of the appellant, but as one which gives him a further opportunity to lead evidence oral and documentary to substantiate the plea on the maintainability of the

suit. The order of remand cannot be construed as having been made in violation of the settled principles of law as has been done by the Hon'ble Supreme Court. It cannot be said that the remand has been made while exercising the powers lightly. Of-course, it was open to the learned appellate Court to have held and pronounced its judgment on the legality of the finding on the issue itself which may have been damaging to the interest of the appellant. As noticed, and as incorporated in the judgment, the appellant gets another opportunity to establish his case. There is no perversity in the order and it does not require any interference.

I have deliberately refrained from expressing any view on the respective merits of the claim of the parties as I find that there is no illegality or perversity in the order of remand, technicalities notwithstanding. A reading of the provisions of Order 14 Rule 2 would show that when there is a mixed question of law and fact, it cannot be treated as a preliminary issue.

Two judgments, one of the Hon'ble Supreme Court and the second by the High Court of Punjab and Haryana, also make it clear that to establish res judicata, questions of fact have to be decided. There is no illegality in the findings of the learned District Judge on this point. As observed by me, the appellant and the respondent have been given full

opportunities to prove their cases including leading additional evidence if so required on the point of res judicata, I do not find any illegality in the judgment. This appeal is, therefore, dismissed.

Parties to appear before the learned District Judge on **June 11, 2007**. There shall be no order as to costs.

CMP No.1244 of 2006.

Infructuous.

May 4, 2007.
(aks)

(Dev Darshan Sud)
Judge.